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No. 98-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HARDWICK BROTHERS COMPANY II,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED AS NEW MATTERS IN OPPOSITION

1. Should, as the government contends, the differing site condition clause of government construction contracts serve as a substitute for *Spearin*'s implied warranty?

2. Did petitioner, as the government contends, fail to advance to the trial court its position that the plans and the conduct of the corps of engineers frustrated its performance of the contract?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is not published, but can be found at 1998 U.S. App. Lexis 20861, August 24, 1998 (Pet App. 1a-12a). The opinion of the Court of Federal Claims is reported at 36 Fed. Cl. 347 (Pet. App. 13a-177a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1998. The Court of Appeals denied a timely petition for rehearing on November 2, 1998 (App. C of Petition). The petition for writ of certiorari was filed February 1, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions involved in this matter. This matter involves fundamental questions of federal common/government contract law.

ADDITIONAL STATEMENTS IN REPLY

1. Hardwick's Complaint in the trial court ¶¶ 15, 16, 20, 43, 78, 79(c)(e)(g), contained numerous allegations of non-disclosures and hindrances during the job. Hardwick's "Seventh Alternative Claim for Relief", was entitled "Supervening Frustration and Man-Made Conditions", and noted that the outlet weir of Cut-Off Lake was raised and flooded the site. Complaint ¶¶ 80, 81,82. The Complaint asserted:

> no disclosure was made to Hardwick of the contours being off. Said information was material in that ground elevations had a substantial influence on Contract performance . . .

Complaint, ¶ 67.

2. The [Joint Pretrial] "Issues of Fact and Issues of Law to Be Resolved by the [Trial] Court", framed the issues, in part stating:

> I.4. Whether material topographic information was omitted from the plans, and if so, whether omission of this topographic information from the plans contributed to their being inadequate, misled the contractor during performance, . . .
>
> V.1. Whether Corps controlled Cut-Off Lake to elevations higher than indicated or were reasonably inferable from the plans during construction or to levels above its natural sill, and, if so, whether this control constituted a change in the method of performance, **constituted interference with the performance by the Government or a man made condition which changed the job site which was created due to inaccurate information provided by the plans as to the height of the original outlet weir.**

3. Page 7 of Hardwick's Pretrial Contentions of Fact and Law under the headings of "Erroneous Outlet Weir Height" stated: "Thus, the inaccurate topographic information resulted in an increase in the controlling weir level for Cut-Off Lake."

4. Under the heading of "Constructive Changes" Hardwick's post trial brief argued:

> It is stipulated that the plans showed the 620 MSL contour line running across the existing weir, which was designated to remain in place. (Stipulations, Part VII, Number 1, Page 31.) The Corps directed that a substantial control structure to raise the lake to 620 be put in place (Exhibit 22). Hardwick could not realize that this direction resulted in an increase in the controlling weir level for Cut-Off Lake. Hardwick had only proposed to establish the sill height in the diversion ditch to the level of the "natural ground". The actual elevation of the old weir was 1.4 feet lower than shown on the plans. Since the plan information provided Hardwick by the Corps was inaccurate, the Corps' direction resulted in the lake being held 1.4 feet higher than previous conditions . . . **the Corps has full responsibility** for the impact of this direction on the raised height of the controlling outlet.

5. It was noted in Hardwick's behalf at final argument to the trial court that:

> Now, there is another critical thing here, . . . and that is we establish that this withholding of information goes back to the period of on-site contract performance. That was when Exhibit 4 [re: the contours being off] was written. Now, . . . the *Public Contract [Law] Journal* for the fall, number 20 [had] an article entitled "Good Faith and Fair Dealing: The Well-Nigh Irrefragable Need for a New Standard in Public Contract Law." [20 Pub. Cont. L. J. 87 (1990)] . . . I cited that in the Errata sheet to the Court . . . Now, what that article pointed out is that . . . [b]oth

> the Claims Court and the Federal Circuit have gone back to the need to view the duty to deal fairly, separately from the obligation of good faith. . . (to page 14) . . . in two separate opinions, *Malone v. United States* at 849 F.2d 1441 and *Maxim Corp. v. United States*, 847 F.2d 1549 . . . the Federal Circuit announced unfair dealing can be a breach of contract. (to page 16) Judge Turner . . . in his recent unpublished decision in *Industrial Constructors Corporation and Firemen's Fund Insurance Company v. United States*, . . . case numbers 472-85C and 140-86C . . . (to Pg. 17, line 18) expressly separated the obligation of fair dealing from good faith, holding that the law did not require the imposing standard of malicious or evil intent when finding a government breach of duty of dealing fairly with the contractor . . . (to pg. 19, Line 1) . . . the law allows the doing of really the right thing by providing remedies for bad faith and unfair dealing, namely for breach of contract.

(Emphasis added).

REASONS REBUTTING NEW POINTS RAISED IN THE BRIEF IN OPPOSITION TO GRANTING THE PETITION

I.

THE DIFFERING SITE CONDITIONS CLAUSE IS A POOR SUBSTITUTE FOR THE IMPLIED WARRANTY OF *SPEARIN* WHEN THE OWNER'S PLANS INACCURATELY DESCRIBE A CONSTRUCTION SITE.

Hercules Inc. v. United States, 516 U.S. 417 (1996), found that a part of the implied warranty of Spearin is that the Plans and Specifications will not frustrate the Contractor's performance. The differing site condition clause does not address this scenario because the differing site conditions clause applies only to conditions that exist prior to performance. Conditions which arise after performance due to specification errors are generally not addressed by the differing site condition clause. Nash & Cibinic, Federal Procurement Law, Vol. II, pg. 1270-73 (1980), item 2, citing *John McShain, Inc. v. United States*, 179 Ct. Cl. 632, 641-42, 375 F.2d 829 (1967), and *Arundel Corp. v. United States*, 103 Ct. Cl. 688, *cert. denied*, 326 U.S. 752 (1945). Rather, the conditions arising after performance are treated, if at all, as a defective specification claim. Nash & Cibinic, Federal Procurement Law, Vol. II, pg. 1271-73 (1980).

Second, the defenses to and burdens imposed on a contractor with regard to a "reasonable" site investigation are much more stringent under the differing site condition clause than in defective specifications claims.

In this Court, general disclaimers and site investigation clauses do not relieve the government of its obligations under its implied warranty. *Hollerbach v. United States*, 233 U.S. 165,

34 S. Ct. 553, 58 L. Ed. 898 (1914); *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920).

The situations where relief is denied under the implied warranty theory are much narrower than the Differing Site Conditions Clause, *e.g.*, conscious assumption of a known risk, minor errors, and obvious flaws and omissions in the plans and specifications. *See* "The Owner's Warranty of the Plans and Specifications for a Construction Project", 14 Pub. Cont. L. J. 240, 246-255 (Feb. 1984) (also citing cases enforcing the implied warranty in performance specifications at fn. 33).

However, the government's defenses under the Differing Site Conditions Clause are much broader because the contractor and the government may rely upon what is "indicated" in the contract documents. What is "indicated" may be proven by "inferences" and "implications" rather than positive statements. *See generally*, McClure, "Differing Site Conditions: Evaluating the Material Difference", 15 Pub. Cont. L. J. 138, 144-45, fn. 14, citing *Foster Construction C.A. v. United States*, 435 F. 2d 873, 881 (Ct. Cl. 1970). Because its focus is on what is "indicated", the Differing Site Conditions Clause must be examined in relation to obligations imposed by the Site Investigation Clause of government construction contracts.

Under the Site Investigation Clause the government attempts to disclaim its own responsibility for the contractor's interpretations of the information made available by the government. While the Site Investigation clause may validly apply to "unreasonable" interpretations of what is "indicated" by the contract documents, the government cannot disclaim liability under the *Spearin* implied warranty for positive representations by using such broad exculpatory language. Under *Spearin* and its progeny, broad "indications" or general

"possibilities" are not specific enough to disclaim responsibility for misrepresentations by positive statements or omissions of specific information. Under the implied warranty doctrine, any disclaimers regarding positive representations must be specific, and warn the contractor that it is *not* to rely on, nor draw any conclusions from positive representations of site conditions. McClure, *Id.* at pg. 149.

The government's proposed substitution of the Differing Site Condition clause for the implied warranty seeks to confuse what is "indicated" under a Differing Site Condition analysis with the representations that are warranted under *Spearin*. McClure, *Id.* p. 159, *see esp.* fn. 86-87. This failure to distinguish between contract "indications" for purposes of a differing site conditions analysis and what is positively represented and can not be disclaimed by "indications" or general disclaimers under the Implied Warranty analysis pervades the Government's approach and the trial court's and the Federal Circuit's opinions.

II.

PETITIONER HAS CONSISTENTLY ADVANCED THE POSITION THAT THE PLANS AND THE ADMINISTRATIVE CONDUCT OF THE CORPS OF ENGINEERS FRUSTRATED ITS PERFORMANCE OF THE CONTRACT.

The Additional Statements in Reply illustrate the error of the Government in asserting that Hardwick "never advanced to the trial court a claim that the Corps frustrated the performance of its contract."

It is also illogical to say that the issue was not presented when it was addressed by the Trial Court, albeit in Hardwick's view, erroneously at 36 Fed. Cl. at 385 (Pet. App. 91a):

> Sufficient proof is simply lacking for this court to find that defendant's conduct was improper and constituted bad faith. The Corps's witnesses convincingly testified that in this case the Corps officials responsible for the Project believed in good faith that any errors in the contour lines established by aerial photogrammetry were within permissible limits. The court finds in these circumstances that plaintiff has failed to prove that defendant violated professional standards with respect to the contours by failing to disclose the results of its January 1978 investigation of possible contour errors.

36 Fed. Cl. at 385.

The limited Government response that the argument was not raised below has no merit. Again, with regard to the legal error of using a "bad faith" standard this Supreme Court stated in *Christie v. United States*, 35 S. Ct. 565,

> It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive. *Hollerbach v. United States*, 58 L. Ed. 898, 34 S. Ct. 553. Besides, it was admitted at the argument that time did not permit borings to be made by claimants. We think it was error, therefore, to have disallowed the damage resulting therefrom.

CONCLUSION

This case presents two questions of exceptional importance to the field of government contract law. First, whether the owners implied warranty of furnished plans and specifications should be limited to "design" specifications and second, whether a "bad faith" standard should be added to claims for frustration or hindrance of contract. Both questions involve such departures by the lower courts from ancient and accepted doctrines of government contract law that this court should exercise its power of supervision over important matters of federal policy and common law. Accordingly, Hardwick's petition for writ of certiorari is meritorious and should be granted in order to address the important matters of public policy raised by this case.

Respectfully submitted,

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